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85-34/85

MEMORANDUM FOR: Director of Central Intelligence

FROM: Harry E. Fitzwater
Deputy Director for Administration

SUBJECT: Impact of File Designations on Processing of Existing
FOIA Cases

1. This memorandum relates to our conversation during the Tuesday morning meeting concerning the "grandfathering" of FOIA cases from the provisions of the CIA Information Act of 1984, the FOIA Relief Act.

2. The reports of the House Permanent Select Committee on Intelligence (HPSCI) and the Senate Select Committee on Intelligence (SSCI), in the section dealing with the retroactive effect of the Act, include a statement that the CIA could as a matter of administrative discretion, decide to complete the processing of requests which had been substantially completed. (See the attached.) After extensive discussions among representatives from components throughout the Agency with responsibility for FOIA processing, including the Office of General Counsel, the decision was made to continue the processing of certain cases.

3. The cases chosen for this treatment in the Directorate of Operations, where the largest number of cases were pending at the time of enactment, were those FOIA cases where the search for and review of responsive documents were essentially complete, that is the documents were already approved for final release at the branch chief level. The number of cases so treated was very small. As best as we are able to determine, the cases that came within this category have been fully completed. All other FOIA cases pending at the time of enactment were treated in full accordance with the Act, regardless of the stage of processing. This means that any responsive documents retrieved from designated files were removed from the case and returned to those designated files.

4. The decision to continue processing of this limited number of cases, with which I concurred at the time, was made because of the few cases involved and because our action would be viewed favorably by the Congress as a positive response to its urging that we do so. As a matter of fact, the HPSCI staff commented favorably on this decision when we briefed them on your designation of operational files, a step we had to take before these designated files could become effective. Our action, moreover, anticipated and avoided the possible accusation that the Agency deliberately held back on releasing material to the public, until the new law was enacted, so that we could conceal records.

/s/ Harry

Harry E. Fitzwater

Attachment:
As Stated

DDA:HEFITZWATER: vg

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98TH CONGRESS } HOUSE OF REPRESENTATIVES { REPT. 98-726
2d Session } Part 1

CENTRAL INTELLIGENCE AGENCY INFORMATION ACT

MAY 1, 1984.—Ordered to be printed

Mr. BOLAND, from the Permanent Select Committee on Intelligence,
submitted the following

REPORT

[To accompany H.R. 5164 which on March 15, 1984, was referred jointly to the Permanent Select Committee on Intelligence and the Committee on Government Operations]

The Permanent Select Committee on Intelligence, to whom was referred the bill (H.R. 5164) to amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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plement the voluntary declassification review program agreed to in an exchange of letters of October 3 and 4, 1983, between Director of Central Intelligence William J. Casey and Senator Dave Durenberger. Those letters refer to "selective" review of materials that the CIA believes "would be of greatest historical interest and most likely to result in declassification of useful information." The type of systematic review Section 3 requires the Director to consider would take into account similar criteria, but would envisage a greater volume of declassification.

SECTION 4 OF H.R. 5164: LIMITED RETROACTIVE EFFECT

Section 4 of the bill provides that CIA operational file exemptions from FOIA requirements under new subsection 701 (a) of the National Security Act of 1947 apply with respect to all FOIA requests, whether made before or after enactment of H.R. 5164, which had not proceeded to the stage of litigation by February 7, 1984. Thus, the exemptions apply retroactively to all FOIA requests which are pending before the Central Intelligence Agency, whether in initial processing or in administrative appeal, on the date of enactment of H.R. 5164. The CIA could, however, as a matter of administrative discretion, decide to complete the processing of any such requests which had been substantially completed. The exemptions will also apply retroactively with respect to all civil actions to enforce access to records under the Freedom of Information Act which were not commenced prior to February 7, 1984. The latter date was the day preceding the hearings on the subject of H.R. 5164 before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence, at which it was first suggested that a date certain be set by which FOIA lawsuits must be filed to ensure that enactment of legislation modifying the application of the FOIA to the CIA will not affect an FOIA request which has proceeded to litigation. The day preceding the hearing was selected to avoid creating an incentive for a race to the courthouse by FOIA complainants in anticipation of the enactment of legislation modifying the application of the FOIA to the CIA.

COMMITTEE POSITION

On April 11, 1984, a quorum being present, the Permanent Select Committee on Intelligence approved H.R. 5164 with an amendment in the nature of a substitute and, by unanimous voice vote, ordered that it be reported favorably.

OVERSIGHT FINDINGS

With respect to clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee notes that it has conducted an extensive investigation, including public hearings, on the application of the Freedom of Information Act to the Central Intelligence Agency. The Committee's findings in this area have resulted in its recommendation that new legislation (H.R. 5164) be enacted. The Committee's reasoning for its recommendation is set out in the body of this report.

Calendar No. 553

98TH CONGRESS }
1st Session }

SENATE

{ REPORT
No. 98-305

INTELLIGENCE INFORMATION ACT OF 1983

NOVEMBER 9 (legislative day NOVEMBER 7), 1983.—Ordered to be printed

Mr. GOLDWATER, from the Select Committee on Intelligence,
submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 1324]

The Select Committee on Intelligence, having considered (S. 1324), a bill to amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency, reports favorably with an amendment in the nature of a substitute and recommends unanimously that the bill as amended do pass.

PURPOSE

The purpose of S. 1324, as reported, is to relieve the Central Intelligence Agency (CIA) from undue burdens of searching and reviewing certain operational files for information in response to Freedom of Information Act requests and thereby enable the Agency to respond to other requests under the Act in a more timely and efficient manner.

AMENDMENT

Strike all after the enacting clause and insert thereof the following:

That this Act may be cited as the "Intelligence Information Act of 1983."

FINDINGS AND PURPOSES

Sec. 2(a). The Congress finds that—

(1) the Freedom of Information Act is providing the people of the United States with an important means of acquiring information concerning the workings and decisionmaking processes of their Government, including the Central Intelligence Agency;

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It is estimated that there is no net cost to the federal government for this bill. Changes in procedures, as mandated in the bill, may reduce the level of effort needed to respond to Freedom of Information Act requests. Changes in staff levels are not anticipated, however, as resources would be used to reduce an existing backlog of requests and improve response time.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

RUDOLPH G. PENNER,
Director.

EVALUATION OF REGULATORY IMPACT

In compliance with subsection 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee finds that S. 1324 will improve protection of the CIA's sources and methods while enabling the CIA to respond to Freedom of Information requests in a more timely and effective manner. The bill will protect the public's right to request information from the CIA to the extent that these requests do not require search and review of operational files; and will protect the right of individual citizens and permanent resident aliens to request information on themselves contained in all category of CIA files. The Committee finds no additional paperwork will be required from individuals filing Freedom of Information requests. In addition, the amount of paperwork required from the CIA should, in fact, be reduced.

TABLE OF CONTENTS

Section 3(b) of S. 1324 sets forth an amendment to the table of contents at the beginning of the National Security Act of 1947 so as to reflect new section 701 of the new title VII.

EFFECTIVE DATE

Section 4 of the "Intelligence Information Act of 1983" sets forth the effective date of the proposed amendment to the National Security Act so that it will apply retroactively to all requests for records that are, on the effective date of the amendment, pending before the Central Intelligence Agency. This would include those requests on administrative appeal and any pending initial requests that had not been finally processed. The agency could, however, as a matter of administrative discretion, decide to complete the processing of any such requests which had been substantially completed. The amendment would also apply to any case or proceeding, including appeals, pending before any court of the United States on the effective date of the amendment. This would result in the dismissal by the courts of all such legal proceedings, or portions thereof, for want of jurisdiction, where the documents in question are located solely in designated operational files and not subject to search and review under the terms of section 701. Without retroactive applicability, it would take years for the relief envisioned by the amendment.

CHANGES IN EXISTING LAW MADE BY THE BILL

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in the existing law made by the bill, as